

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jun 16, 2020

SEAN F. MCAVOY, CLERK

RUBY T.,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 4:19-CV-05091-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 13, 17. Attorney Chad L. Hatfield represents Ruby T. (Plaintiff); Special Assistant United States Attorney Ryan Ta Lu represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **DENIES** Defendant's Motion for Summary Judgment; **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. §§ 405(g), 1383(c).

**JURISDICTION**

Plaintiff filed applications for Supplemental Security Income (SSI) and

1 Disability Insurance Benefits (DIB) on September 9, 2015, Tr. 122, 138, 264,  
2 alleging disability since October 1, 2014, Tr. 266, 273, due to a back injury,  
3 bipolar depression, anxiety, Hashimoto's Thyroiditis, type 2 diabetes, cervical  
4 spondylosis, lumbar-sacral spondylosis, neck/muscle strain, migraines, and chronic  
5 back pain, Tr. 328. The applications were denied initially and upon  
6 reconsideration. Tr. 178-85. Administrative Law Judge (ALJ) R.J. Payne held a  
7 hearing on January 25, 2018 and heard testimony from Plaintiff, medical expert  
8 Lynne Jahnke, M.D., psychological expert Nancy Winfrey, Ph.D., and vocational  
9 expert Jeff Cockrum. Tr. 40-93. The ALJ issued an unfavorable decision on  
10 March 9, 2018 finding Plaintiff was not disabled from October 1, 2014 through the  
11 date of the decision. Tr. 15-31. In the decision, the ALJ reopened Plaintiff's  
12 previous application, which was filed on September 29, 2014. Tr. 15. The  
13 Appeals Council denied review on February 20, 2019. Tr. 1-5. The ALJ's March  
14 9, 2018 decision became the final decision of the Commissioner, which is  
15 appealable to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff  
16 filed this action for judicial review on April 26, 2019. ECF No. 1.

### 17 **STATEMENT OF FACTS**

18 The facts of the case are set forth in the administrative hearing transcript, the  
19 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
20 here.

21 Plaintiff was 40 years old at the amended date of onset. Tr. 266. Plaintiff  
22 completed a nursing program in 1998. Tr. 329. Her reported work history was as  
23 a Licensed Practical Nurse. Tr. 330. When applying for benefits Plaintiff reported  
24 that she stopped working on February 1, 2010, stating "I was fired from my last job  
25 and I went into a deep depression." Tr. 329. Even though she was fired, she stated  
26 that her conditions became severe enough to keep her from working as of February  
27 1, 2010 and that the severity of her conditions caused her to make changes in her  
28 work activity as early as November 1, 2009. *Id.*

## STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

## SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the claimant establishes that physical or mental impairments prevent her from engaging in her previous occupations. 20 C.F.R. §§ 404.1520(a),

1 416.920(a)(4). If the claimant cannot do her past relevant work, the ALJ proceeds  
2 to step five, and the burden shifts to the Commissioner to show (1) the claimant  
3 can make an adjustment to other work, and (2) the claimant can perform specific  
4 jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*,  
5 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make an  
6 adjustment to other work in the national economy, she is found "disabled." 20  
7 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

#### 8 ADMINISTRATIVE DECISION

9 On March 9, 2018, the ALJ issued a decision finding Plaintiff was not  
10 disabled as defined in the Social Security Act from October 1, 2014 through the  
11 date of the decision.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
13 activity since October 1, 2014, the alleged date of onset. Tr. 18.

14 At step two, the ALJ determined that Plaintiff had the following severe  
15 impairments: degenerative disc disease of the spine with spondylosis and arthritis;  
16 obesity; bipolar disorder; panic disorder; generalized anxiety disorder; and major  
17 depressive disorder. Tr. 18.

18 At step three, the ALJ found that Plaintiff did not have an impairment or  
19 combination of impairments that met or medically equaled the severity of one of  
20 the listed impairments. Tr. 18.

21 At step four, the ALJ assessed Plaintiff's residual function capacity and  
22 determined that she could perform a range of sedentary work with the following  
23 limitations:

24 [S]he can lift, carry, push, and/or pull 10 pounds occasionally and 5  
25 pounds frequently. The claimant has no limitations on her ability to sit.  
26 She can stand 30 minutes at one time, and can walk 30 minutes at one  
27 time with 2 hours total in an 8-hour workday. She can occasionally  
28 stoop, kneel, crouch, crawl, and balance. She can occasionally climb  
ramps and stairs; but never climb ladders, ropes, or scaffolds. The

1 claimant can have no exposure to unprotected heights. She can have  
2 no concentrated exposure to extreme cold or heavy industrial vibration.  
3 The claimant can frequently reach overhead with her bilateral upper  
4 extremities. The claimant is unable to work in a job setting where the  
5 general public is generally present, and is unable to work in large  
crowds (i.e., no work where there are 30 or more co-workers in a small  
room).

6 Tr. 21. The ALJ identified Plaintiff's past relevant work as a licensed practical  
7 nurse, and found that Plaintiff was not able to perform this past relevant work. Tr.  
8 29.

9 At step five, the ALJ determined that, considering Plaintiff's age, education,  
10 work experience and residual functional capacity, and based on the testimony of  
11 the vocational expert, there were other jobs that exist in significant numbers in the  
12 national economy Plaintiff could perform, including the jobs of document preparer,  
13 addresser, and call-out operator. Tr. 30. The ALJ concluded Plaintiff was not  
14 under a disability within the meaning of the Social Security Act from October 1,  
15 2014, through the date of the ALJ's decision. Tr. 31.

## 16 ISSUES

17 The question presented is whether substantial evidence supports the ALJ's  
18 decision denying benefits and, if so, whether that decision is based on proper legal  
19 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the  
20 medical opinions in the record; (2) failing to make a proper step three  
21 determination; (3) failing to properly weigh Plaintiff's symptom statements; and  
22 (4) failing to make a proper step five determination.

## 23 DISCUSSION

### 24 1. Medical Opinions

25 Plaintiff argues that the ALJ failed to properly consider and weigh the  
26 medical opinions expressed by Kevin Taylor, M.D., Maria Castillo, ARNP,  
27 Thomas Genthe, Ph.D., Brent Packer, M.D., Lynne Jahnke, M.D., and Nancy  
28 Winfrey, Ph.D. ECF No. 13 at 10-15.

1 In weighing medical source opinions, the ALJ should distinguish between  
 2 three different types of physicians: (1) treating physicians, who actually treat the  
 3 claimant; (2) examining physicians, who examine but do not treat the claimant;  
 4 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
 5 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more  
 6 weight to the opinion of a treating physician than to the opinion of an examining  
 7 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ  
 8 should give more weight to the opinion of an examining physician than to the  
 9 opinion of a nonexamining physician. *Id.*

10 When an examining physician's opinion is not contradicted by another  
 11 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,  
 12 and when an examining physician's opinion is contradicted by another physician,  
 13 the ALJ is only required to provide "specific and legitimate reasons" to reject the  
 14 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be  
 15 met by the ALJ setting out a detailed and thorough summary of the facts and  
 16 conflicting clinical evidence, stating his interpretation thereof, and making  
 17 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is  
 18 required to do more than offer his conclusions, he "must set forth his  
 19 interpretations and explain why they, rather than the doctors', are correct."  
 20 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

21 **A. Kevin Taylor, M.D. and Maria Castillo, ARNP**

22 On January 8, 2016, Nurse-Practitioner Castillo<sup>1</sup> completed a Physical  
 23

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24  
 25 <sup>1</sup>The Court acknowledges that a Nurse-Practitioner in this case would not be  
 26 considered an acceptable medical source, and therefore not subject to the specific  
 27 and legitimate standard set forth in *Lester*. 20 C.F.R. §§ 404.1502(a), 416.902(a);  
 28 *See Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). However, since the

1 Functional Evaluation form for the Washington Department of Social and Health  
2 Services (DSHS). Tr. 857-59. Nurse-Practitioner Castillo opined that Plaintiff's  
3 impairments caused a marked limitation in the following basic work activities:  
4 sitting, standing, walking, lifting, carrying, handling, pushing, pulling, reaching,  
5 stooping, crouching, and communicating. Tr. 858. Nurse-Practitioner Castillo  
6 opined that Plaintiff was capable of performing sedentary work in a regular  
7 predictable manner despite her impairments. Tr. 859. She stated that Plaintiff's  
8 limitation would persist for six to twelve months with available medical treatment.  
9 *Id.*

10 On December 1, 2017, Nurse-Practitioner Castillo and Dr. Taylor signed a  
11 letter stating the following:

12 The patient has been very compliant and optimistic with her long-term  
13 therapy and treatment plan for the conditions listed today. Her  
14 activities of daily living have been altered over time with minimal  
15 progression currently, at this time. Her health condition and limitations  
16 are not likely to change within the next year. I do recommend disability  
assistance for this very pleasant person.

17 Tr. 917.

18 On December 18, 2017, Nurse-Practitioner Castillo completed a Medical  
19 Report form. Tr. 918-19. She opined that if Plaintiff were attempting to work a  
20 40-hour per week schedule she would probably miss four or more days per month  
21 due to her medical impairments. Tr. 919. Additionally, she stated that based on  
22 the cumulative effect of all Plaintiff's limitations she would likely be off-task over  
23 30% of the time during a 40-hour workweek. *Id.* The ALJ assigned these opinions  
24 little weight, stating the following:

25 Although the opinion that the claimant can perform sedentary work is  
26

27 ALJ's reasons for rejecting the opinions were not supported by substantial  
28 evidence, the standard the ALJ was required to meet is not at issue.



1 consistent with the record evidence as a whole, the remainder of their  
2 opinions regarding disability are afforded little weight. This opinion is  
3 inconsistent with the documented improvement in the claimant's pain  
4 and limiting symptoms with her prescribed course of conservative  
5 treatment. Further, their opinions do not adequately account for the  
claimant's ability to independently care for her personal needs and her  
daily activities despite the combined effect of her physical impairments.

6 Tr. 26-27. The ALJ followed this statement with a string of citations to the record,  
7 which were presumably in support of his conclusion. Tr. 27. First, the ALJ cited  
8 to a January 25, 2018 letter from Plaintiff following the hearing. Tr. 429. It is  
9 unclear what the ALJ intended to substantiate with the citation to this document.  
10 In the letter, Plaintiff states that Nurse Practitioner Castillo "is the only person I  
11 feel like I can really trust and open up to." Tr. 429.

12 Next, the ALJ cites twice to an x-ray from February 10, 2017 showing  
13 "[s]table findings of cervical spondylosis." Tr. 898-99. This provides no insight  
14 into the improvement the ALJ stresses is present, nor does it address Plaintiff's  
15 ability to independently care for herself or perform her daily activities. Therefore,  
16 this citation does not support the ALJ's finding.

17 The ALJ cites twice to the same Physical Therapy Progress Report dated  
18 April 24, 2017 stating that Plaintiff "has attended 12 physical therapy visits for this  
19 episode of care. At this time she notes that the pain continues to remain." Tr. 901,  
20 988. Her goal was to decrease her pain, and her prognosis was listed as fair. Tr.  
21 902, 989. The additional physical therapy records cited by the ALJ show slow  
22 antalgic gate. Tr. 990. Therefore, this also does not support the ALJ's conclusion  
23 that Plaintiff's impairments improved.

24 The ALJ then cites to 38 pages of records from Stephen Dechter, D.O. Tr.  
25 920-57. These records show that Plaintiff received two bilateral sacroiliac joint  
26 steroid injections and one bilateral lumbar medial branch block. Tr. 925, 934, 941.  
27 By the last appointment in December of 2017, Plaintiff stated that only 10% of the  
28 pain symptoms were relieved and that the current therapy was not adequate. Tr.



1 920. While some of the records noted improvement with the pain initially  
2 following each injection, this relief did not last. Plaintiff reported a 20% pain  
3 relief following the bilateral lumbar medial branch block. Tr. 939. On March 6,  
4 2017, Plaintiff reported her pain was much improved following the February 16,  
5 2017 injection, but by June 20, 2017 Plaintiff reported her pain was returning and  
6 Dr. Dechtler recommended another injection. Tr. 929, 932. She received her  
7 second injection on September 7, 2017, Tr. 925, but by December 26, 2017 she  
8 reported only a 10% improvement in pain, Tr. 920. Therefore, this citation to the  
9 record does not support the ALJ's finding that Plaintiff's treatment improved her  
10 pain.

11 Next, the ALJ cited a December 23, 2017 MRI showing no evidence of  
12 acute lumbar spine compression fracture, but there was multilevel diffuse posterior  
13 disc bulge without significant spinal stenosis, and mild right neural foraminal  
14 stenosis at L4-5 level without definite impingement of the right exiting L4 nerve  
15 root. Tr. 959-60. The report states that "there is probably no significant interval  
16 change since the prior exam," which was an MRI from October 14, 2014. *Id.* This  
17 does not support the ALJ determination that Plaintiff's pain improved with  
18 treatment or that she can care for herself and perform daily activities.

19 Finally, the ALJ cited to a January 30, 2018 examination by Melvin Wahl,  
20 M.D. diagnosing Plaintiff with degenerative lumbar spinal stenosis, stating that she  
21 "has lifestyle limiting pain." Tr. 1158-63. Again, this citation to the record does  
22 not support the ALJ's finding that Plaintiff's pain improved with treatment or that  
23 she could perform personal care or daily activities.

24 Here, the ALJ found that Plaintiff's pain improved with treatment, she was  
25 capable of caring for her personal needs, and could perform her daily activities.  
26 Tr. 27. However, the evidence the ALJ cited does not support these findings.  
27 Therefore, these reasons are not supported by substantial evidence, and the matter  
28 is remanded for additional proceedings to properly address the medical opinions in

1 the record.

2 **B. Thomas Genthe, Ph.D.**

3 Dr. Genthe completed an evaluation and a Psychological/Psychiatric  
4 Evaluation form for DSHS. Tr. 860-69. He diagnosed Plaintiff with major  
5 depressive disorder with anxious distress, post-traumatic stress disorder, and other  
6 specified personality disorder (with borderline, avoidant, paranoid and passive  
7 aggressive features). Tr. 862. He opined that she would have a moderate  
8 limitation in five basic work activities. Tr. 862-63. He concluded the evaluation  
9 with the following statement:

10 From a psychological perspective, [Plaintiff's] prognosis is viewed as  
11 guarded, which is based on the chronicity of her problems. At this time,  
12 she is unlikely to function adequately in a work setting until her  
13 psychological symptoms have been managed more effectively. Given  
14 her response to treatment, and willing participation, a period of no less  
15 than 6-9 months may likely be needed to address her treatment needs at  
16 least moderately well, and help her regain the necessary emotional  
functioning to resume fulltime work related activities.

17 Tr. 863. The form is undated; however, it appears that DSHS generated the form  
18 for Dr. Genthe's completion on February 24, 2016. Tr. 860, 864. The ALJ gave  
19 Dr. Genthe's opinion great weight, stating the following:

20 His opinion is consistent with the improvement in the claimant's mental  
21 health symptoms with her prescribed course of treatment. His opinion  
22 also adequately accounts for the claimant's need for continued mental  
23 health treatment for anxiety related symptoms. Further, his opinion is  
24 consistent with the claimant's ability to independently care for her  
25 personal needs and activities of daily living despite her mental health  
symptoms.

26 Tr. 27.

27 Plaintiff argues that by assigning the opinion great weight and not finding  
28 her disabled, the ALJ failed to set forth specific and legitimate reasons for rejecting

1 Dr. Genthe's statement that Plaintiff "is unlikely to function adequately in a work  
2 setting until her psychological symptoms have been managed more effectively."  
3 ECF No. 13 at 13. Defendant argues that this statement is of little probative value  
4 because disability is an issue reserved for the Commissioner. ECF No. 17 at 11-  
5 12. Defendant is accurate that a statement from a medical source that a claimant is  
6 "disabled" or "unable to work" does not require the ALJ to determine the claimant  
7 meets the definition of disability. 20 CFR §§ 404.1527(d)(1), 416.927(d)(1).  
8 Nevertheless, the Ninth Circuit has held that "[i]f the treating physician's opinion  
9 on the issue of disability is controverted, the ALJ must still provide 'specific and  
10 legitimate' reasons in order to reject the treating physician's opinion." *Holohan v.*  
11 *Massanari*, 246 F.3d 1195, 1203 (9th Cir. 2001). Here, the ALJ provided no  
12 reason for rejecting any portion of the opinion from Dr. Genthe, who was an  
13 examining psychologist. The Court recognizes the difference between a treating  
14 and examining provider, but relies on S.S.R. 96-8p in extending the Ninth Circuit's  
15 holding in *Holohan* to the examining psychologist in this case. *See* S.S.R. 96-8p  
16 (the residual functional capacity assessment "must always consider and address  
17 medical source opinions. If the [residual functional capacity] assessment conflicts  
18 with an opinion from a medical source, the adjudicator must explain why the  
19 opinion was not adopted."). Since the ALJ included no such explanation, the ALJ  
20 will readdress the full opinion on remand.

21 **C. Brent Packer, M.D.**

22 In March of 2016, Dr. Packer reviewed records from Lourdes Family  
23 Medicine, TCCH, and Dr. Genthe and completed a Review of Medical Evidence  
24 form and a Disability/Incapacitation Determination form for DSHS. Tr. 891-97.  
25 On March 4, 2017, Dr. Packer limited Plaintiff to sedentary work and gave her  
26 marked limitations in environmental/non-exertional restrictions, postural  
27 restrictions, and gross or fine motor skill restrictions. Tr. 895. He also assigned  
28 her a significant or moderate limitation in six of the psychological basic work

1 activities. Tr. 894. On March 7, 2017, Dr. Packer recommended changing the  
2 limitation to less than sedentary work stating that Plaintiff was unable to perform  
3 sedentary work for “even brief periods without employer accommodations.” Tr.  
4 892. He also stated that it was unlikely that Plaintiff could pace and persist over a  
5 normal 40-hour workweek. *Id.* He further stated that impairment severity equaled  
6 listing 1.02A. *Id.*

7 The ALJ gave little weight to the marked environmental, postural, and  
8 manipulative limitations “as the record as a whole demonstrates an improvement in  
9 the claimant’s physical condition with her prescribed course of conservative  
10 treatment.” Tr. 27. Here, the ALJ failed to address any portion of the March 7,  
11 2017 opinion. Nowhere did the ALJ address the limitation to less than sedentary  
12 work, the inability to pace and persist, or the equaling of a listed impairment.  
13 Social Security Ruling (S.S.R.) 96-8p states that the residual functional capacity  
14 assessment “must always consider and address medical source opinions. If the  
15 [residual functional capacity] assessment conflicts with an opinion from a medical  
16 source, the adjudicator must explain why the opinion was not adopted.” Therefore,  
17 on remand the ALJ will readdress Dr. Parker’s opinions.

18 **D. Lynne Jahnke, M.D., and Nancy Winfrey, Ph.D.**

19 Dr. Jahnke and Dr. Winfrey testified at Plaintiff’s hearing. Tr. 45-66.  
20 Despite stating that Plaintiff did not meet a listing and providing a residual  
21 functional capacity opinion that was not work preclusive, Dr. Jahnke stated that “I  
22 wouldn’t disagree with either of them [Nurse Practitioner Castillo and Dr. Packer]  
23 and I think as you said, the nurse, knowing the claimant, undoubtedly factoring in  
24 the mental health issues that might make coping with ongoing pain difficult. More  
25 difficult than the, for you or I perhaps.” Tr. 58. Likewise, Dr. Winfrey found  
26 Plaintiff did not equal or meet a listing, but she did limit Plaintiff to “not be in a  
27 public setting, including no interaction with the public, but no job that takes place  
28 in the public.” Tr. 62. She also opined that an increase in psychological symptoms

1 would coincide with physical flares. Tr. 66.

2 The ALJ assigned these opinions great weight. Tr. 28. However, since the  
3 case is being remanded for the ALJ to readdress the other medical source opinions  
4 in the record, these opinions will also have to be readdressed on remand.

## 5 **2. Step Three**

6 Plaintiff challenges the ALJ's step three determination that Plaintiff's  
7 impairments did not medically equal a listing. ECF No. 13 at 15-16.

8 The ALJ determined that Plaintiff's impairments did not meet or medically  
9 equal the severity of one of the listed impairments. Tr. 18. Since the case is  
10 remanded for the ALJ to properly address an opinion that includes a finding that  
11 Plaintiff's impairments equaled listing 1.02A, the ALJ will readdress step three on  
12 remand.

## 13 **3. Plaintiff's Symptom Statements**

14 Plaintiff contests the ALJ's determination that Plaintiff's symptom  
15 statements were unreliable. ECF No. 13 at 16-19.

16 It is generally the province of the ALJ to make determinations regarding the  
17 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the  
18 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,  
19 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,  
20 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear  
21 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81  
22 F.3d at 834. "General findings are insufficient: rather the ALJ must identify what  
23 testimony is not credible and what evidence undermines the claimant's  
24 complaints." *Lester*, 81 F.3d at 834.

25 The ALJ found Plaintiff's "statements concerning the intensity, persistence,  
26 and limiting effects of these symptoms are not entirely consistent with the medical  
27 evidence and other evidence in the record for the reasons explained in this  
28 decision." Tr. 22. The evaluation of a claimant's symptom statements and their

1 resulting limitations relies, in part, on the assessment of the medical evidence. See  
2 20 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, in light of the case  
3 being remanded for the ALJ to readdress the medical source opinions in the file, a  
4 new assessment of Plaintiff's subjective symptom statements will be necessary.

#### 5 **4. Step Five**

6 Plaintiff challenges the ALJ's determination at step five. ECF No. 13 at 20.  
7 Since the case is being remanded to further address medical source opinions and  
8 Plaintiff's symptom statements, a new residual functional capacity determination  
9 and step four determination will be required. Upon remand, the ALJ will make a  
10 step five determination if one is required.

#### 11 **REMEDY**

12 The decision whether to remand for further proceedings or reverse and  
13 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
14 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
15 where "no useful purpose would be served by further administrative proceedings,  
16 or where the record has been thoroughly developed," *Varney v. Secretary of Health*  
17 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
18 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280  
19 (9th Cir. 1990); *see also Garrison v. Chater*, 759 F.3d 995, 1021 (9th Cir. 2014)a  
20 (noting that a district court may abuse its discretion not to remand for benefits  
21 when all of these conditions are met). This policy is based on the "need to  
22 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are  
23 outstanding issues that must be resolved before a determination can be made, and it  
24 is not clear from the record that the ALJ would be required to find a claimant  
25 disabled if all the evidence were properly evaluated, remand is appropriate. *See*  
26 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211  
27 F.3d 1172, 1179-80 (9th Cir. 2000).

28 This case is remanded for additional proceedings because it is not clear from

1 the record that the ALJ would be required to find Plaintiff disabled if all the  
2 evidence were properly evaluated. Additional proceedings are necessary for the  
3 ALJ to further address the medical source opinions in the record, the step three  
4 determination, Plaintiff's symptom statements, and the step five determination.  
5 Additionally, the ALJ will supplement the record with any outstanding medical  
6 evidence and take testimony from a vocational expert in the event that a step four  
7 or five determination is required.

8 **CONCLUSION**

9 Accordingly, **IT IS ORDERED:**

10 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
11 **DENIED**.

12 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is  
13 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings  
14 consistent with this order.

15 3. Application for attorney fees may be filed by separate motion.

16 The District Court Executive is directed to file this Order and provide a copy  
17 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
18 **and the file shall be CLOSED.**

19 DATED June 16, 2020.



A handwritten signature in black ink, appearing to read "M", is positioned above the printed name of the judge.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE